Supreme Court, U.S.
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No. 02-1623

In The Supreme Court of the United States

TULARE COUNTY, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*, NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* BILL LOCKYER, ATTORNEY GENERAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OBJECTION TO QUESTIONS PRESENTED

Because the court below did not use a heightened pleading standard in dismissing Counts I-IV of petitioners' complaint, neither question articulated by the petition is accurate and neither presents an issue for Supreme Court review, nor does the petition present any other appropriate question for resolution by this Court.

CORPORATE DISCLOSURE STATEMENT

The Natural Resources Defense Council, the Sierra Club, The Wilderness Society, and the Tule River Conservancy are all non-profit corporations with no parent company. No publicly held company owns any stock in any of them.

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STATEMENT OF THE CASE

Petitioners ("Tulare County") ask this Court to review and reinstate their lawsuit seeking invalidation of Giant Sequoia National Monument (the "Monument"). The Monument was created by Presidential Proclamation 7295 (April 15, 2000) (the "Proclamation") to protect natural and man-made objects of scientific and historic interest situated on approximately 328,000 acres of federal land in the mountains of central California. *See generally* Appendix ("App.") to Tulare County's Petition for a Writ of Certiorari ("Pet.") at 35-44. While the Monument was named for the giant sequoia groves it encompasses, it protects numerous other resources as well, within a "rich and varied landscape." App. 35. The Proclamation describes, among other protected objects: "a great belt of coniferous forest, jeweled with mountain meadows," "[b]old granitic domes, spires, and plunging gorges," "an extraordinary number of habitats within a relatively small area," "a diverse array of plants and animals, many of which are rare or endemic," "limestone caverns," "unique paleontological resources," "many archeological sites," and "historic remnants of early Euroamerican settlement." *Id.* The Proclamation goes on to detail many of these features and discuss their scientific and historic interest. *Id.* at 36-39. The precise extent of those features that the President deemed worthy of inclusion within a national monument is fixed by a map referenced and incorporated in the Proclamation. App. 40.

As relevant here, Tulare County sued on several claims dependent on the novel theory that, apart from the giant sequoia groves, the objects designated by the Proclamation are too amorphous to qualify for protection under the Antiquities Act. Most of the objects, in Tulare County's

view, are referenced in too "vague and generalized" a fashion, App. 47 (¶2), and not identified specifically enough by "physical description and geographic location," App. 79 (¶134). Thus the land protecting these objects, as opposed to those Tulare County conceives of as "valid" or "genuine," App. 81 (¶148) and 82 (¶149), *i.e.*, the giant sequoia groves, App. 47 (¶2) and Pet. at 14, was improperly included in the Monument.

Tulare County's complaint also asserts that national monument status actually threatens the designated objects by hampering management in a way petitioners allege increases the risk of fire. The Proclamation explicitly considered this issue and provided management flexibility to respond to it in several ways. *See* App. 36-37 (acknowledging a pre-existing hazard of wildfires); *id.* at 41-42 (permitting removal of trees "if clearly needed for ecological restoration and maintenance of public safety" and allowing construction of new roads and trails "to further the purposes of the monument," while mandating development of regulations and a management plan to protect the Monument, the latter with guidance from a Scientific Advisory Board appointed in consultation with the National Academy of Sciences). Nonetheless Tulare County asked that the Proclamation be found in violation of the Antiquities Act for jeopardizing included objects.[1] App. 84 (¶160).

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[1] In accordance with SUP.CT.R. 15.1, respondents note their disagreement with how Tulare County's petition characterizes its complaint and the Proclamation on the restrictiveness of the Proclamation and the risk of fire. *See* Pet. 6-8, 17. These documents are included in petitioners' Appendix and speak best for themselves. Respondents

(Continued on following page)

The District Court disposed of all Tulare County's claims on the pleadings. *Tulare County v. Bush*, 185 F.Supp.2d 18, 29-30 (D.D.C. 2001). On appeal, a unanimous Court of Appeals affirmed on all counts. *Tulare County v. Bush*, 306 F.3d 1138, 1144 (D.C. Cir. 2002). Tulare County petitioned for rehearing en banc, arguing that the appeals panel had applied too high a standard of pleading. *Tulare County v. Bush*, 317 F.3d 227, 227 (D.C. Cir. 2003). No member of the District of Columbia Circuit requested a vote on rehearing, and the panel wrote specially to clarify that it "examined the complaint against a no more rigorous standard of pleading than that of FED.R.CIV.P. 8(a)." *Id.*

ARGUMENT

Tulare County has identified no "compelling reason" (SUP.CT.R. 10) why the Court should grant certiorari. For each count of the Complaint, the Court of Appeals identified a fatal flaw in petitioners' legal theory. Thus, every count is governed by the well-established rule that dismissal on the pleadings is appropriate if "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The District Court was therefore correct in dismissing the complaint, and the appeals court was correct in affirming dismissal. While Tulare County plainly

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also object to Tulare County's unfounded request that this Court take judicial notice of their characterization of the McNally fire. *Id.* at 8.

disagrees with the legal conclusions of the courts below, that disagreement does not justify Supreme Court review.

Tulare County fails to bring its case within SUP.CT.R. 10's articulated reasons for a grant of certiorari by asserting that the Court of Appeals applied a heightened pleading standard to its complaint, ostensibly in contravention of F.R.CIV.P. 8(a) and this Court's prior decisions. *See* Pet. at 19. Because the Court of Appeals found Tulare County's complaint deficient as a matter of law, the allegation that the Court of Appeals *sub silentio* required an illicit level of factual specificity is as immaterial as it is wrong. When Tulare County raised this argument on petition for rehearing, the appeals court affirmed that "no more rigorous a standard of pleading than that of FED.R.CIV.P. 8(a)" was called for in such cases.[2] App. 34. Petitioners' rationale thus founders on this Court's admonition that "certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." SUP.CT.R. 10. Because the petition identifies neither an actual conflict with the decisions of this Court or of another appellate court, nor any important question of federal law that this Court should settle, it should be summarily denied.

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[2] The Court of Appeals originally articulated this standard, citing *Conley v. Gibson*, 355 U.S. at 45-46, in its opinion in the companion case to this one, *Mountain States Legal Foundation v. George Bush*, 306 F.3d 1132, 1134 (D.C. Cir. 2002), decided the same day.

I. Dismissal of Counts I Through IV Did Not Hinge On a Heightened Standard of Factual Pleading and Presents No Issue Meriting Supreme Court Review.

A. Count I Fails as a Matter of Law.

The Court of Appeals correctly found Count I insufficient as a matter of law. The court, with great accuracy, characterized Count I as "premised on the assumption that the Antiquities Act requires the President to include a certain level of detail in the Proclamation." *Tulare County v. Bush*, 306 F.3d at 1141. The operative paragraph of Tulare County's complaint asserts that petitioners are "entitled to judgment . . . because the objects of historic and scientific interest . . . have not been identified with reasonable specificity." App. 80 (¶139); *see also id.* (¶138) (referring to "the specificity required by the Antiquities Act"). As the court succinctly noted: "[n]o such requirement exists." *Tulare County v. Bush*, 306 F.3d at 1141. No heightened pleading standard contributed in any way to this legal conclusion, and Tulare County has thus identified no conflict between this ruling and any decision of this Court or any other court of appeals.

B. Count II Fails as a Matter of Law.

For similar reasons the Court of Appeals properly found that Count II failed as a matter of law. The court, again quite accurately, described the complaint as alleging "that the President has designated nonqualifying objects for protection." *Id.* at 1141. For comparison, the Complaint asserts that the "Proclamation purports to designate landscapes, scenic areas, ecosystems and other amorphous and imprecise items . . . . These items do not meet the

minimum qualifications for objects to be protected by a proclamation issued under the Antiquities Act." App. 80-81 (¶143). The Court of Appeals easily and correctly rejected this legal theory and, with it, any need for factual development: "[i]nclusion of such items as ecosystems and vistas in the Proclamation did not contravene the terms of the statute." *Tulare County v. Bush*, 306 F.3d at 1142. (noting that this Court had rejected a similar argument in *Cappaert v. United States*, 426 U.S. 128 (1976)). Again, the complaint's fatal defect was not a function of how detailed its factual allegations were or were not. The court rejected Tulare County's legal theory. And again, Tulare County points to no actual conflict between that ruling and another circuit's or this Court's decisions.

C. Count III Fails as a Matter of Law.

Count III depends on the same legal theory of the Antiquities Act as Count II, and fails as a matter of law for the same reason. Count III asserts that if one ignores the landscapes, scenic areas, and ecosystems that are described at length in the Proclamation, the Monument is then of greater size than necessary to protect the remaining objects, those that Tulare County sees as "valid." *See* App. 81 (¶148) ("[t]he Antiquities Act does not authorize the President to withdraw land parcels for inclusion in a Monument which are not necessary for the protection of *valid* objects") (emphasis added). Tulare County reiterates here that "at least 94% of the Monument area is not necessary to protect the only objects that can be identified and located from the Proclamation, *i.e.*, the mapped Giant Sequoia Groves." Pet. 14; *see also* App. 47 (¶2). This is not, as petitioners would have it, a factual assertion wrongly subjected to a heightened pleading standard. Rather, as

the Court of Appeals held, it "is a legal conclusion couched as a factual allegation," *Tulare County v. Bush*, 306 F.3d at 1142, about whether objects that are unequivocally described in the Proclamation qualify for protection under the Antiquities Act.

To survive judgment on the pleadings, Tulare County would have had to assert more than that not all of the Monument area was unnecessary for protection of a subset of the objects the President designated. To create a legally sufficient claim independent of the failed Count II, Tulare County would have had to allege, as the court below correctly concluded in denying rehearing, that "some part of the Monument does not, in fact, contain natural resources that the President sought to protect." *Tulare County v. Bush*, 317 F.3d at 227. That petitioners did not assert, and could not have, since no dispute was raised, or exists, that the landscapes, scenic areas, and ecosystems described in the Proclamation collectively are co-extensive with the Monument.[3]

D. Count IV Fails as a Matter of Law.

Count IV also fails, not because of lack of detail in its factual allegations, but because no proof of facts would entitle Tulare County to relief under the articulated legal

[3] No factual challenge was available on the issue of whether the scientific or historic value of the objects was great enough to merit protection in a national monument, since that is a decision the Antiquities Act squarely entrusts to presidential discretion. *See* 16 U.S.C. §431(2) ("The President of the United States is authorized, in his discretion, to declare by public proclamation . . . objects of historic or scientific interest").

theory. Count IV asks the judiciary to undertake a role it cannot properly fulfill. Tulare County alleges that "the Proclamation fails to protect any purported Monument objects and in fact renders their harm and destruction more likely." App. 84 (¶160). Notably, the Antiquities Act contains no explicit requirement or standards for management provisions. At all events, as noted above, the Proclamation directly considers the issue raised by Tulare County, and provides for it. *See, e.g., id.* at 36-37 (noting the "hazard of wildfires"); and 41-42 (permitting logging "if clearly needed for ecological restoration and maintenance of public safety" and allowing for new roads and trails "to further the purposes of the monument"). By seeking review of these provisions, Tulare County asks that a court substitute its judgment for the President's, with no standards to guide it. This the courts below properly declined to do. *Cf. Dalton v. Specter*, 511 U.S. 462, 476 (1994) ("[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for our review").

II. Count V Provides No Occasion for Review By This Court.

Finally, the Court of Appeals correctly affirmed dismissal of Count V, which is, in effect, simply a constitutional gloss on Tulare County's core theory that the Antiquities Act authorizes protection only of certain discrete physical objects with inarguable boundaries. Tulare County claims that if the Antiquities Act does not make designation of such objects illegal, then it is unconstitutional. *See* App. 85 (¶166) ("[i]f . . . President Clinton is authorized under the Antiquities Act to issue the Proclamation . . . for the purpose of protecting undefined, vague and amorphous entities . . . then in this instance Congress has

ceded its Constitutional power . . ."). However, petitioners point to no decision of another appellate court or of this Court with which the Court of Appeals' rejection of this theory conflicts. Nor do they identify any other reason for this Court to review the eminently sensible conclusion that the Antiquities Act does contain intelligible principles to guide presidential discretion, notwithstanding that it does not contain the peculiar standards Tulare County ascribed to it.

CONCLUSION

Wherefore, respondents the Natural Resources Defense Council, the Sierra Club, The Wilderness Society, and the Tule River Conservancy respectfully request that the Petition for a Writ of Certiorari in this matter be denied.

Respectfully submitted,

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Dated: June 9, 2003